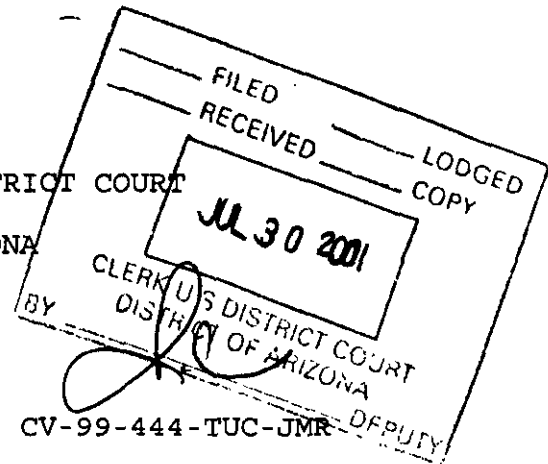


IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Neil T. Nordbrock,)
)
 Plaintiff,)
)
 v.)
)
 United States of America,)
)
 Defendant.)
)

NO. CV-99-444-TUC-JMR

ORDER



Pending before the Court are Plaintiff's Motion to Reconsider the Court's order dated September 27, 2000 and Defendant's Response to the Court's order, which also requests reconsideration.

BACKGROUND

This case arises from Plaintiff's refusal to turn over copies of tax returns he prepared from 1978-1981. As a result of his refusal, the IRS, pursuant to 26 U.S.C. § 6659(d), assessed the maximum penalty, \$25,000, against Plaintiff for each of the three years he refused to turn over information. The first penalty was assessed on June 28, 1982 and the second and third penalties were assessed on December 28, 1982. The IRS filed notices of federal tax liens with the Pima County Recorder against Plaintiff and Swan Business Organization as nominee of Plaintiff.¹

In August 1983, the government filed an action in federal court seeking an injunction against Plaintiff to compel him to disclose the requested tax return information. In December 1983,

¹Swan Business Organization is owned by Plaintiff and his wife. In 1983, Plaintiff and his wife conveyed property (Swan Road Property) to Swan Business Organization.

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after paying \$250.00 towards the penalties, Plaintiff filed a separate suit in federal court seeking a refund of the \$250.00 and an abatement of the remainder of the penalties. In the lawsuit initiated by Plaintiff, the government filed a counterclaim for \$74,750, the balance of the assessment still owed by Plaintiff.

In the government's action for injunctive relief, the district court issued summary judgment in favor of the government. Summary judgment was also issued in favor of the government in Plaintiff's action for refund and abatement. Plaintiff appealed both decisions.

The cases were consolidated on appeal. The Ninth Circuit reversed and remanded both cases, finding that a material issue of fact existed with respect to whether Plaintiff acted wilfully in refusing to turn over the requested tax return information to the IRS. See United States v. Nordbrock, 828 F.2d 1401 (9th Cir. 1987).

On remand, the cases were consolidated. (83-CV-553 TUC WDB). A bench trial was held. On January 17, 1990, the district court entered judgment in favor of the government and against Plaintiff. The court concluded that Plaintiff had acted wilfully in refusing to turn over the requested information to the IRS. The court enjoined Plaintiff from preparing tax returns for other taxpayers and sustained the \$75,000 in penalties assessed against Plaintiff. Plaintiff appealed.

On appeal, the Ninth Circuit again reversed and remanded. The Court found that Plaintiff was entitled to a trial by jury. See United States v. Nordbrock, 941 F.2d 947 (9th Cir. 1991).

On remand, a jury trial was conducted. The jury found that Plaintiff had not acted in good faith and wilfully had failed to comply with the law. Pursuant to 26 U.S.C. § 7407(b), the court issued a lifetime injunction against Plaintiff prohibiting him from preparing tax returns for other taxpayers. In addition, the court found that Plaintiff was not entitled to a refund or an abatement. At that time, however, the court did not enter judgment on the government's counterclaim for the unpaid balance of the penalties.² Plaintiff appealed.

On October 11, 1994, the Ninth Circuit affirmed the jury's verdict, the district court's issuance of the lifetime injunction, and the penalties assessed against Plaintiff. See United States v. Nordbrock, 38 F.3d 440 (9th Cir. 1994).

During the pendency of these lawsuits, in October 1992, the IRS seized the Swan Road Property. A notice of seizure was sent to Swan Business Organization as Plaintiff's nominee. The IRS also began proceedings to sell the property. However, these proceedings were stayed due to Swan Business Organization and Plaintiff separately filing for bankruptcy. Swan Business Organization's and Plaintiff's bankruptcy petitions were dismissed on August 2, 1994 and December 4, 1995, respectively.

Once the bankruptcy actions were dismissed, the IRS proceeded to sell the Swan Road Property pursuant to a sealed bid sale. The property was sold on April 25, 1996 for \$62,501.10. On September

² On June 3, 1993, the district court issued an amended judgment, entering judgment in favor of the government and against Plaintiff on the government's counterclaim for the unpaid balance of the penalties. This amended judgment was entered nunc pro tunc as of October 28, 1992.

7, 1999, Plaintiff filed the instant case. Plaintiff seeks a refund of \$62,501.10, the amount realized from the sale of the Swan Road Property, reasonable attorneys' fees and costs and whatever further relief the Court deems justified. On December 15, 1999, Defendant filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

On September 27, 2000, the Court issued an order denying Defendant's motion to dismiss for lack of subject matter jurisdiction. The Court denied Defendant's motion to dismiss for failure to state a claim with respect to the June 28, 1982 assessment but granted the motion as to the December 28, 1982 assessments and all other claims raised in Plaintiff's complaint. The Court concluded that Plaintiff was entitled to a refund of that portion of the sale proceeds used to satisfy the June 1982 penalties. Because the record was unclear as to what portion of the sale proceeds was applied to the June 1982 penalties, if any, the Court ordered Defendant to supply the Court with this information so the Court could enter judgment in Plaintiff's favor accordingly.

Thereafter, Plaintiff filed a motion to reconsider and Defendant filed a response to the Court's order. In Defendant's response, it also requests reconsideration.

PLAINTIFF'S MOTION TO RECONSIDER

In Plaintiff's motion to reconsider, Plaintiff states he wishes to clarify some of the footnotes in the Court's order. Plaintiff also contends that the Court erred in 1) concluding that

the statute of limitations for collection of the December 28, 1982 assessments had not expired, 2) determining that the bankruptcies did not nullify the October 1992 seizure, 3) finding that the liens were valid and 4) accepting the government's "self-serving lie" that changing the date of an assessment was a typographical error. The Court will address each of Plaintiff's arguments.

1. *Footnotes*

Footnote 3 of the Court's September 27, 2000 order states that according to Plaintiff's exhibits, only the federal tax liens against Plaintiff were released by the IRS, not the liens against Swan Business Organization. Plaintiff now submits three exhibits stating that the liens against Swan Business Organization were released on September 15, 1990. The exhibits submitted by Plaintiff in his motion to reconsider do not demonstrate that the liens against Swan Business Organization were released. In fact, they demonstrate the opposite. Exhibit A demonstrates that only the lien recorded on April 11, 1988 was released. The lien recorded on September 16, 1983 against Swan Business Organization was re-filed.³ Exhibit B demonstrates that the release of the liens against Swan Business Organization was revoked and the liens were re-instated.

Plaintiff states that footnote 4 in the Court's order should be changed to reflect that Swan Business Organization is not owned

³The veracity of Exhibit A is questionable as Plaintiff failed to submit the actual release form. Exhibit A contains a computer-generated list of liens against Plaintiff and Swan Business Organization. To the right of each lien, an individual wrote "released 9-15-90" or "refiled." The identification of the individual is unknown.

by Plaintiff alone but instead is owned equally by Plaintiff and his wife. That Plaintiff's wife was an equal owner of Swan Business Organization was not clear in Plaintiff's original pleadings. The Court notes this factual clarification but because it was not relevant to the Court's decision, the September 27, 1999 order will not be amended.

Plaintiff also argues that footnote 5 is inconsistent with footnote 7. The Court disagrees. Although the government counterclaimed for the unpaid penalties in Plaintiff's December 1983 lawsuit, Footnote 7 correctly states that Defendant has not counterclaimed for the unpaid penalties in *this* case.

2. Statute of Limitations

In his motion to reconsider, Plaintiff argues that the Court incorrectly ruled that the statute of limitations for collection of the December 28, 1982 assessment had not expired. He states that the IRS relied on the district court's January 17, 1990 judgment against Plaintiff as the basis of its seizure of Plaintiff's property. However, Plaintiff contends this judgment was overturned by the Ninth Circuit.

Plaintiff relies on Exhibit D, attached to his motion to reconsider. This exhibit appears to be a summary and recommendation from William Keebler, an appeals officer, as to whether a seizure of Plaintiff's property was necessary. As to whether the statute of limitations had expired on the preparer penalties, Mr. Keebler's recommendation was "No." Within this recommendation, he states that the IRS must initiate a proceeding in court to collect the tax within 6 years after the assessment.

He then states that a proceeding against Plaintiff was timely filed and a judgment was issued by the United States District Court for the District of Arizona on January 17, 1990.

Plaintiff is correct that the district court's January 17, 1990 decision was reversed by the Ninth Circuit. However, after a jury trial was held, the jury reached the same conclusion, finding that Plaintiff had acted wilfully in refusing to turn over the requested information to the IRS. Judgment was issued in favor of the government and against Plaintiff. The jury's verdict was affirmed by the Ninth Circuit. In addition, the reference to the January 17, 1990 judgment had no effect on Mr. Keebler's recommendation. The relevant factor was that a proceeding was initiated against Plaintiff to collect the tax within six years after the assessment. Accordingly, Plaintiff's arguments lack merit.

3. Bankruptcy Issue

Plaintiff argues that in order to have had a valid seizure of the Swan Road Property in this case, Defendant would have had to re-seize the property after termination of the bankruptcy proceedings initiated by Plaintiff and Swan Business Organization. As explained in the Court's September 27, 2000 order, Defendant levied on the Swan Road Property and filed its notice of seizure before Plaintiff or Swan Business Organization filed their bankruptcy petitions. Defendant did not sell the property until after the bankruptcy petitions had been dismissed.

The Court has found no law to support Plaintiff's argument that the filing of bankruptcy somehow invalidates a notice of

seizure served before the bankruptcy proceedings were initiated. The case law cited by Plaintiff in his motion to reconsider does not support Plaintiff's position either. It merely states that a creditor who knowingly retains a bankruptcy debtor's property violates the automatic stay provisions of bankruptcy law. Here, Defendant did not have possession of the Swan Road Property at the time the bankruptcy petitions were filed. It merely had filed a notice of seizure. In fact, when Defendant became aware of the pending bankruptcy proceedings, all seizure activity stopped. The property was not sold until after the bankruptcy petitions were dismissed.

4. Invalid Liens

Plaintiff argues that the liens issued in this case were invalid because they did not contain a written declaration that they were made under the penalty of perjury as required under 26 U.S.C. § 6065. He states that the Court incorrectly applied this statute only to citizen filers. In addition, Plaintiff contends that Defendant improperly relies on Revenue Ruling 71-466 for the proposition that liens need not be certified. He states revenue rulings are not the law.

The congressional intent in enacting § 6065 was to permit a verified return to be substituted for a notarized return. Cohen v. United States, 201 F.2d 386, 393 (9th Cir.) (construing § 6065's predecessor provision), cert. denied, 345 U.S. 951 (1953). Section 6065 applies to returns and other written declarations filed by taxpayers. The statute does not require that a lien or other notice issued by the IRS be verified by a written declaration that

it is made under penalty of perjury. See Thompson v. I.R.S., 23 F.Supp.2d 923, 925 (N.D. Ind. 1998); Morelli v. Alexander, 920 F.Supp. 556, 558 (S.D.N.Y. 1996); Davis v. Comm'r of Internal Revenue, 115 T.C. 35, 42 (2000).

5. Typographical error

Plaintiff argues that two IRS employees committed fraud by changing the first penalty assessment date from June 28, 1982 to June 28, 1992 on a levy form in an attempt to subvert the statute of limitations. The Court concluded that it was merely a typographical error. Plaintiff alleges that the error was not simply a typographical error. He states that the computer is programmed to recognize the statute of limitations and the alteration of dates was needed in order to record the notice of liens within the statute of limitations. Plaintiff further states that this fraudulent act led him to issue a lien draft to the IRS for \$398,000. Plaintiff requests the Court to order a criminal prosecution of the IRS employees who changed the dates or at least order them to show cause why they should not be prosecuted for their criminal acts.

The Court affirms its conclusion that the change of dates was a typographical error. As stated in its September 27, 2000 order, all other documents contain the correct date and Defendant has never stated that the first assessment occurred on a date other than June 28, 1982.

**DEFENDANT'S RESPONSE TO THE COURT'S ORDER
AND REQUEST FOR RECONSIDERATION**

In its September 27, 2000 order, the Court determined that the

levy on the Swan Road Property, to the extent the sale proceeds were used to satisfy the penalties assessed against Plaintiff on June 28, 1982, was outside the statute of limitations and therefore, Plaintiff was entitled to a refund of that portion of the sale proceeds applied to the June 1982 assessment. In making this determination, the Court concluded that 26 U.S.C. § 6502(a), as it existed prior to its amendment in 1988, applied. However, as to the December 28, 1982 penalty assessments, the Court concluded that the 1988 amendment to § 6502(a) applied and the levy on the Swan Road Property, to the extent the sale proceeds were used to satisfy the penalties assessed on December 28, 1982, was within the statute of limitations. Because it was unclear as to how the sale proceeds were applied to the June 28, 1982 assessment, the Court ordered Defendant to provide the Court with detailed information on how the proceeds from the sale of the Swan Road Property applied to Plaintiff's penalty assessments.

In response to the Court's order, Defendant states that the entire sale proceeds of the Swan Business Property were credited to the June 1982 assessment. However, Defendant contends that because Plaintiff had notice and demand for payment, Defendant should be permitted to exercise its statutory and common law rights of setoff.

Despite providing the Court with information regarding how the proceeds were applied to the June 28, 1982 assessment, Defendant requests that the Court reconsider its September 27, 2000 order. Defendant argues that Congress can, and did, extend the right to collect the liabilities at issue by levy. It contends that even

though the statute of limitations as to the June 1982 assessment had expired, the 1988 amendment to 26 U.S.C. § 6502(a) revived the time-barred claim. The Court disagrees.

The pre-1988 version of 26 U.S.C. § 6502 (a) provided that a tax could be collected by levy or a proceeding in court as long as the levy or proceeding in court was begun within six years after the assessment of the tax. This six-year period could not be extended or curtailed based upon a judgment against the taxpayer. In 1988, Congress amended § 6502(a) to provide that if a timely proceeding in court for collection of the tax was commenced, the six-year period to collect on the tax by levy was extended until the liability for the tax was satisfied or became unenforceable.

The statutory history of § 6502(a) provides that the 1988 amendment was to apply to all levies issued after the date of its enactment, November 10, 1988. Here, the levy on the Swan Road Property was issued in October, 1992. Therefore, technically, the 1988 amendment to § 6502(a) would apply. However, Congress did not specifically provide that the 1988 amendment would apply to levies issued after November 10, 1988, which were already time-barred under the earlier version of § 6502(a).

The Court agrees with Defendant that Congress has the authority to extend a statute of limitations, even if this extension results in revival of time-barred claims. "[T]he length and indeed the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control. . . . [A] statute of limitations . . . can be extended, without violating the Due Process Clause, after the cause of action

arose and even after the statute itself as expired." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228-29 (1995) (citing Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)). Congress has exercised this power in the area of student loans and courts have upheld the exercise of this power. See e.g. United States v. Phillips, 20 F.3d 1005(9th Cir. 1994). In addition, when Congress amended § 6502(a) in 1990, substituting a 10-year statute of limitations for the 6-year limitations period, Congress provided that the 1990 amendment would apply to taxes assessed after November 15, 1990, unless the period for collection of the tax had not expired. However, unlike the student loan cases and the 1990 amendment to § 6502(a), Congress did not expressly provide in the 1988 amendment or its legislative history that its intent was to apply the amendment retroactively and revive time-barred claims.⁴ In fact, the amendment is not retroactive as it applies to levies issued after, not before, the date of its enactment.

Based on the above, the Court re-affirms its September 27, 2000 order.

DEFENDANT'S RIGHTS OF SETOFF

Defendant informs the Court that the entire proceeds from the sale of the Swan Road Property were applied to the June 28, 1982 assessment. Accordingly, Plaintiff would be entitled to a refund of the entire sale proceeds. However, Defendant states that it should be permitted to exercise its statutory rights to setoff.

⁴ "[T]he traditional rule [is] that statutes do not apply retroactively unless Congress expressly states that they do." Plaut, 514 U.S. at 237 (citing Landgraf v. USI Film Products, 511 U.S. 277-80 (1994)).

Defendant shall provide a brief to the Court regarding this issue within 30 days of its receipt of this order. Plaintiff may respond to this brief within 20 days of his receipt of Defendant's brief.

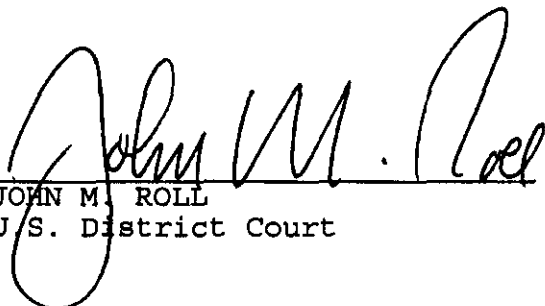
Accordingly,

IT IS ORDERED that Plaintiff's Motion to Reconsider is GRANTED but relief is DENIED.

IT IS FURTHER ORDERED that Defendant's Request for Reconsideration is GRANTED but relief is DENIED, except as to the issue regarding rights of setoff.

IT IS FURTHER ORDERED that Defendant shall provide the Court with a brief regarding the issue of setoff within 30 days of its receipt of this order. Plaintiff may respond to Defendant's brief within 20 days of his receipt of Defendant's brief.

Dated this 27 day of July, 2001.


JOHN M. ROLL
U.S. District Court